

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

PLESCHOURT V. PLESCHOURT

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
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LISA M. PLESCHOURT, APPELLEE,
V.
JOHN W. PLESCHOURT, APPELLANT.

Filed July 31, 2012. No. A-11-824.

Appeal from the District Court for Frontier County: DAVID URBOM, Judge. Affirmed in part, and in part reversed and remanded with directions.

Eddy Rodell and Stephanie Flynn for appellant.

Brian J. Davis, of Berreckman & Davis, P.C., for appellee.

MOORE and PIRTLE, Judges, and CHEUVRONT, District Judge, Retired.

PIRTLE, Judge.

INTRODUCTION

John W. Pleschourt appeals from an order of the district court for Frontier County modifying his child support obligation and granting Lisa M. Pleschourt one of the dependency exemptions for the parties' minor children. Based on the reasons that follow, we affirm in part, and in part reverse and remand with directions.

BACKGROUND

John and Lisa were divorced in 2005, and the decree awarded Lisa custody of the parties' four minor children. John was ordered to pay child support of \$731 per month for four children and was granted the dependency exemptions for all four children on his tax returns. In 2009, Lisa requested a modification of child support and the court increased John's obligation to \$1,469 per month for four children, and \$1,258 for three children.

On December 22, 2010, John filed a complaint for modification of child support alleging a material change in circumstances based on a change in his income. He alleged that a

recalculation of his child support obligation was warranted because he was unemployed. Lisa filed a counterclaim asking that she be given the dependency exemptions for the children. After a trial, the court entered an order on August 29, 2011, modifying and reducing John's child support obligation to \$1,114 for three children beginning September 1, 2011. The parties' oldest child had reached the age of majority at the time of trial. The court also ordered that Lisa be given the dependency exemption for the youngest child but that the dependency exemptions for the other two minor children remain with John.

ASSIGNMENTS OF ERROR

John assigns that the trial court erred in (1) determining the incomes used for the parties in calculating child support, (2) failing to apply the child support modification retroactively to the filing date of the complaint to modify, and (3) modifying the dependency exemptions and failing to conform its order to its findings in regard to the dependency exemptions.

STANDARD OF REVIEW

Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court. *Metcalf v. Metcalf*, 278 Neb. 258, 769 N.W.2d 386 (2009).

ANALYSIS

Child Support Calculation.

John first assigns that the trial court erred in determining the parties' incomes for purposes of child support. The trial court used John's income as indicated on his 2010 tax return, which the court apparently accepted as John's earning capacity, and used Lisa's current income. Based on the incomes the court used, it concluded that application of the child support guidelines resulted in a variation by 10 percent or more of John's current child support obligation, that such financial circumstances have lasted more than 6 months, and that a material change of circumstances had been established and had not been rebutted. See Neb. Ct. R. § 4-217.

John argues that it was error for the court to use his 2010 income as his earning capacity because he was unemployed at the time of the trial and had been for several months. He further contends that if the court was going to use his earning capacity in calculating child support, then it should have also used Lisa's earning capacity rather than her current income.

At the time of trial, John had been unemployed since early September 2010 and was receiving unemployment compensation. He filed his complaint to modify on December 21, 2010.

John has a college degree and has worked in the restaurant business in various capacities for 25 years. He lives within 25 miles of Minneapolis, Minnesota. His most recent job was at "Rick Bronson's House of Comedy" (House of Comedy), where he was the general manager from December 2009 to early September 2010. John was terminated from that job. John had expected to make around \$51,000 per year at that employment, earning \$42,000 in salary and around \$9,000 in bonuses. However, John claimed that the employer had refused to pay him bonuses that were promised. John's income for 2010 was over \$40,000, which included wages earned at the House of Comedy and unemployment compensation.

Prior to working at the House of Comedy, John worked at “Bar Abilene” from July 2008 to October 2009 as the general manager earning \$52,000 per year. He was also terminated from that job. John’s income in 2009 was over \$45,000.

John testified that since his job was terminated in September 2010, he has been actively seeking employment, but was only looking for jobs comparable to his former positions. He testified that taking a job for which he was overqualified would be detrimental to his career progression so he was holding out for something comparable to his recent jobs. He testified that he has been submitting between two and seven applications per week, but has been unable to secure a job at a similar level to what he had in the past. He also testified that due to “blips on [his] resume [he] will not be at \$52,000 a year again for likely anywhere from three to ten years depending on the market.”

Although John testified that he is still actively looking for a job, he also testified that he had accepted a general manager job for a restaurant that was expected to open in October 2011 and where he would make \$26,000 per year. John testified that the restaurant will be owned by his “significant other,” who is the one setting John’s salary. Later in his testimony, John testified that he has not actually been hired for the general manager job and that he continues to look for employment. John still suggests in his appellate brief, however, that \$26,000 per year reflects his current income and such amount should have been used in calculating child support.

According to the Nebraska Child Support Guidelines, earning capacity may be considered in lieu of a parent’s actual, present income and may include factors such as work history, education, occupational skills, and job opportunities. Neb. Ct. R. § 4-204.

John filed his complaint to modify in December 2010, just over 3 months after his termination of employment in early September from House of Comedy. Although he was still unemployed at the time of trial in August 2011, he testified that he was only looking for jobs similar to those he had in the past because a job for which he was overqualified would be detrimental to his career. He has worked in the restaurant business for 25 years and lives near Minneapolis, yet he claimed he could not find a job in the restaurant business. Based on the evidence presented, we conclude that the court did not abuse its discretion in using John’s 2010 income as his earning capacity to calculate child support.

In regard to Lisa’s income, John contends that if the court used his earning capacity, it should have used Lisa’s earning capacity as well, which he argues is significantly higher than the wages she was earning at the time of trial. At the time of trial, she was working full time at a bank as a customer service representative earning \$10 per hour. She started working at the bank in April 2011. The trial court used Lisa’s income at the time of trial in calculating child support, which was \$1,733 per month, or approximately \$20,800 per year.

Lisa had previously worked as the director at a daycare center and left that job because the daycare was closing for the summer and she would not have a job. Her 2009 and 2010 tax returns indicate that she earned around \$30,000 in each of those years.

Although Lisa was earning more working at the daycare than she was at the time of trial, she left the daycare only because she knew it was closing for at least the summer and did not want to be without a job. There is no evidence that she purposely reduced her income.

Based on the evidence presented, there was no abuse of discretion by the trial court in using the incomes that it did in calculating child support. John's first assignment of error is without merit.

*Failure to Apply Child Support
Modification Retroactively.*

John assigns that the trial court erred in failing to order that the modified child support should be applied retroactively to the filing date of the complaint to modify. John filed his complaint to modify on December 22, 2010, and argues that the child support modification should have been applied retroactively to January 1, 2011. At trial, Lisa requested that any reduction in child support not be applied retroactively due to the fact that John was behind \$4,000 in child support at the time. The trial court ordered that the modified child support payments would begin on September 1, 2011, after the trial court entered its order.

Absent equities to the contrary, modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification. *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001). The initial determination regarding the retroactive application of a child support modification order is entrusted to the discretion of the trial court, and the decision of the trial court will be affirmed absent an abuse of discretion. *Id.*

Although the trial court did not state any reason in its order for not applying the modification retroactively, given that John was \$4,000 behind in child support at the time of trial, we do not conclude that the trial court abused its discretion in failing to order that the modified child support obligation be applied retroactively.

Dependency Exemptions.

John next argues that the trial court erred in modifying the dependency exemptions and erred in failing to implement the changes on the child support worksheet. John first contends that there has not been a material change in circumstances to warrant a modification of the dependency exemptions.

A party seeking to modify a dissolution decree must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification which was not contemplated when the prior order was entered. *Wilson v. Wilson*, 19 Neb. App. 103, 803 N.W.2d 520 (2011). A material change of circumstances in this context means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Id.*

The initial decree awarded John the dependency exemptions for all of the parties' minor children so long as he was current on his child support obligation by December 31 of each tax year. Pursuant to Lisa's counterclaim at issue, the trial court ordered that Lisa be given the dependency exemption for the youngest child and that the dependency exemptions for the other two minor children remain with John.

Lisa alleged in her counterclaim that a material change in circumstances had occurred since the entry of the decree and since the first modification, in that John has continuously and repeatedly fallen behind on his monthly child support obligation and does not become current on his payments until late in December of each year. Lisa asked the court to modify the dependency

exemptions due to not receiving child support payments on a consistent monthly basis. John admits that his child support payments have been made inconsistently, but argues that the decree provided only that he be current on his payments at the end of each year to be entitled to the dependency exemptions and that he has always paid the full amount of his child support by December 31 of each year. However, Lisa also testified that the children's needs and expenses are consistent each month and that it has been difficult to meet those needs and expenses with inconsistent child support payments. She further testified that the children are on Medicaid and that when she receives large amounts of child support at one time, the children lose their Medicaid coverage for 3 months. She testified that would not happen if she received the child support every month.

A tax dependency exemption is nearly identical in nature to an award of child support or alimony. *Prochaska v. Prochaska*, 6 Neb. App. 302, 573 N.W.2d 777 (1998). The dependency exemption for income tax returns is an economic benefit. *Id.* A trial court may exercise its equitable powers to allocate dependency exemptions between custodial and noncustodial parents. *Id.*

The evidence shows that John has failed to pay his child support consistently on a monthly basis and that instead, he makes larger payments at various times of the year, always making sure that he is current on his payments at the end of each year. This makes it difficult for Lisa to meet the needs and expenses of the children that occur every month. The evidence supports a finding that a material change of circumstances occurred to warrant a change in the award of dependency exemptions.

The trial court did not abuse its discretion in modifying the dependency exemptions--awarding Lisa one exemption and John two exemptions. However, John also contends, and Lisa agrees, that the trial court did not implement the changes in the dependency exemptions on the child support worksheet. The child support worksheet shows "0" child exemptions for Lisa and "3" exemptions for John. Further, the worksheet does not give John any deduction for federal taxes. Accordingly, we remand the matter to the trial court with directions to recalculate child support after correcting the dependency exemptions on the worksheet in accordance with the court's order giving Lisa one exemption and John two exemptions and with directions to correct the federal withholding for John.

CONCLUSION

We conclude that the trial court did not err in determining the parties' incomes for child support purposes, did not err in failing to apply the child support modification retroactively to the filing date of the complaint to modify, and did not err in modifying the dependency exemptions. However, we conclude that the trial court failed to implement the changes it made to the dependency exemptions on the child support worksheet and failed to give John any deduction for federal taxes. Therefore, we remand the matter to the trial court with directions to recalculate child support after correcting the dependency exemptions on the worksheet in accordance with the modification made by the court in its August 29, 2011, order and with directions to correct the federal withholding for John.

AFFIRMED IN PART, AND IN PART REVERSED
AND REMANDED WITH DIRECTIONS.